

1 Charles L. Murray III, SBN 195053
2 444 South Flower St., Suite 1500
3 Los Angeles, California 90071
4 Telephone (213) 627-5983
5 Facsimile (213) 627-6051

6 Attorney for Plaintiff
7 MARK D. DAVIS

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA-LOS ANGELES

10 MARK D. DAVIS,
11 Plaintiff,
12 vs.

13
14 DAVIDSON HOTEL COMPANY, LLC, a
15 Delaware limited liability company;
16 TOM HARWELL, an individual; and
17 DOES 1-50, inclusive,
18 Defendants
19

Case No: CV12-06327 CAS (AJWx)
Honorable Christina A. Snyder

**PLAINTIFF MARK DAVIS'
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF WITNESSES AND
ANY AND ALL TESTIMONY OF
HARASSMENT OF ANYONE OTHER
THAN PLAINTIFF; DECLARATION
OF CHARLES L. MURRAY III IN
SUPPORT THEREOF**

Hearing Date: July 1, 2013

20
21
22 **TO THE HONORABLE CHRISTINA A. SNYDER, UNITED STATES DISTRICT**
23 **COURT JUDGE, AND TO ALL DEFENDANTS AND THEIR ATTORNEYS OF**
24 **RECORD:**

25 Pursuant to the Court granting Defendants' Ex Parte Motion to Shorten
26 Time, Plaintiff MARK DAVIS submits the following Opposition Defendants
27 Motion in Limine seeking to exclude witnesses and indirect evidence inferring
28 discrimination and harassment in their workplace.

1 Defendants are now trying a new tactic to circumvent the authority cited
2 by this Court in denying Defendants Motion for Summary Judgment. This
3 Court, and others, acknowledged discrimination cases often rely in indirect
4 evidence and inferences and the totality of the evidence should be viewed in a
5 “cumulative” mode.

6 To avoid these standards, Defendants improperly seek to remove all
7 reference of indirect evidence and inferences of mal intent by Defendants by
8 mischaracterizing potential evidence as “me too”.

9 The following issues are relevant and require denial of Defendants motion.

- 10 • Plaintiff alleges Defendants discriminated against Tracy Ward based upon
11 sexual orientation. Defendants claim sexual orientation had nothing to do
12 with it, and Defendants did not discriminate against Ward or harass
13 Plaintiff because of his association with Ward. Evidence that infers a
14 discriminatory intent is relevant and required for a “full fact finding” by the
15 jury who views all evidence “cumulatively”.
- 16 • Testimony that supports or infers discrimination in the workplace is
17 relevant to establish a “discriminatory intent” by Defendants. If other
18 witnesses also perceived this mal intent, then it is probative to the issues
19 of intent, pretext, association/advocacy, and FEHA’S social context.
- 20 • Defendants wrongfully seek to exclude any testimony that infers Plaintiff’s
21 belief in discriminatory intent was proper and that Defendants had created
22 an unhealthy work environment.

23 Defendants simply want to exclude probative evidence that supports
24 Plaintiff’s theory of the case. Turning this case into “he said, she said”
25 mudslinging. Rather than a “full fact finding” inquiry as required by law.
26
27
28

1 **I. DEFENDANTS EXHIBITS ESTABLISH PROPER DISCLOSURE.**

2 Defendants' first argument is to preclude both Leila Clark and Mohamad
3 Ghazizadeh from testifying because they were not properly disclosed.

4 Defendants claim is a ploy to avoid and/or prevent damaging testimony.
5 Federal Rule of Evidence 401, 402 *and* 403 are not to be used because a
6 defendant will suffer damage to their defense because of testimony that relates
7 to inferences of perceived discrimination and perception of a "severe" or
8 "pervasive" environment.

9 Plaintiff's October 17, 2012 Rule 26 disclosures clearly lists both Leila
10 Clark and Mohamad Ghazizadeh as witnesses:

11
12 *F. Mohammad Ghazizadeh, employed by Hilton Corporate in*
13 *Anaheim, facts surrounding complaint for harassment and hostile*
14 *work environment alleged in Plaintiff's complaint, including*
harassment hostility towards Tracy Ward;

15
16 *I. Leila Clark, employed by Defendant, facts surrounding complaint*
17 *for harassment and hostile work environment alleged in Plaintiff's*
complaint, including harassment hostility towards Tracy Ward;

18 Leila Clark and Mohamad Ghazizadeh were disclosed in the October 17,
19 2012 Rule 26 Disclosures [Murray Decl.]

20 Leila Clark and Mohamad Ghazizadeh were again disclosed by Plaintiff in
21 his June 11, 2013 Rule 16-4 Witness List. [Murray Decl.]

22 They are not new witnesses. Defendants simply don't like what they have
23 to say about them. Which is not a basis for 401 or 403 objections.

24 Notably, Defendants elected not to take any depositions of Leila Clark and
25 Mohamad Ghazizadeh and arguably have waived any claim of prejudice
26 through their inaction [Murray Declaration ¶ 5].

27 Furthermore, Plaintiff's counsel expressly reserved the right to call all
28 disclosed witnesses and documents [Murray Declaration ¶ 6].

1 **II. DEFENDANTS PROPOSED MOTION IN LIMINE IS A DISGUISED**
 2 **EFFORT TO KEEP RELEVANT EVIDENCE AWAY FROM THE JURY.**

3 The Court in properly denying Defendants Motion for Summary Judgment
 4 cited California authority which holds discrimination in the workplace and
 5 harassment is difficult to prove and requires that the jury see "all" the evidence
 6 as to effectuate FEHA'S remedial statutory design.

7 **The Court "must bear in mind that, because discrimination cases**
 8 **often depend on inferences rather than on direct evidence"** (*Benson v.*
 9 *Northwest Airlines, Inc.* 62 F.3d 1108, 1111 (8th Cir. 1995), citing *Crawford v.*
 10 *Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994).) emphasis added.

11 "[W]hether an environment is 'hostile' or 'abusive' can be determined only
 12 **by looking at all the circumstances.** *Miller v. Department of Corrections*,
 13 (2005) 36 Cal.4th 446, 462. However, this determination requires judges and
 14 juries to exercise '[c]ommon sense, and an appropriate sensitivity to social
 15 context' in order to evaluate **whether a reasonable person in the plaintiff's**
 16 **position would find the conduct severely hostile or abusive."** *Beyda v. City*
 17 *of Los Angeles* (1998) 65 Cal.App.4th 511, 518-519; See also CACI 2524¹
 18 specifically dealing with "circumstances" and "nature".

19 Plaintiff DAVIS believed Tracy Ward to be a good employee, and in light
 20 of the totality of the circumstances, felt the pressure to discipline Ward was
 21 clearly pretext for Defendants dislike for homosexuals.

22 The *Yanowitz* court further held that a court should consider all the acts
 23 allegedly taken by a defendant against a plaintiff **"collectively. . . constitute a**
 24

25 ¹ "Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile
 26 or abusive work environment. In determining whether the conduct was severe or pervasive, you
 27 should consider all the circumstances. **You may consider any or all of the following: (a) The nature**
 28 **of the conduct;** (b) How often, and over what period of time, the conduct occurred; **(c) The**
circumstances under which the conduct occurred; (d) Whether the conduct was physically
 threatening or humiliating; (e) The extent to which the conduct unreasonably interfered with an
 employee's work performance.

1 sufficient adverse employment action under the relevant standard (materially
2 affecting the terms, conditions, or privileges of employment) *Yanowitz* at 1060.

3 Defendants' reliance on Federal Rules of Evidence 401, 402 and 403 is
4 unpersuasive.

5 Rule 401 holds *Evidence is relevant if (a) it has any tendency to make a*
6 *fact more or less probable than it would be without the evidence; and (b) the*
7 *fact is of consequence in determining the action.* Undeniably evidence directly,
8 indirectly or inferring discriminatory intent based upon sexual orientation,
9 affiliation or advocacy with a member of a protected class under FEHA meets
10 both elements. Because of the "reasonable" person and "social context"
11 implications, evidence from third parties relating to discriminatory intent and a
12 perceived retaliation or severity or pervasiveness is relevant to the central
13 issues. This evidence facts is not probatively outweighed because it supports
14 Plaintiff. The "me too" position argumentative seeks to divert the Court and jury
15 away from relevant evidence required by law for full fact finding.

16 Defendants offer no supporting facts in their Motion in Limine under Rule
17 402 *Relevant evidence is admissible unless any of the following provides*
18 *otherwise: the United States Constitution; a federal statute; these rules; or other*
19 *rules prescribed by the Supreme Court.* Absent any reference to facts to trigger
20 Rule 402, Defendants seem misguided and their argument unsupported at best.

21 Lastly, Defendants reliance on Rule 403 is speculative, unsupported by
22 facts that demonstrate the relevant inferences and testimony would be
23 prejudicial. This is not a case of "it is because we say it is." Defendants cannot
24 improperly seek to exclude probative evidence related to factual issues of
25 association or advocacy with a member of a protected class, retaliation and
26 wrongful termination, and any material that will harm Defendants. Defendants
27 seek to exclude of all evidence to leave a jury likely to wonder "what gay
28 employee?" Or "what is protected?" Defendants have offered no evidence that

1 ties Leila Clark and Mohamad Ghazizadeh potential testimony to a “me too”
 2 argument. Nowhere in Plaintiff’s disclosures does it say Leila Clark and
 3 Mohamad Ghazizadeh will testify they suffered discrimination or retaliation.
 4 Should they testify that Plaintiff and Ward suffered discrimination or retaliation,
 5 that would be heavily probative towards establishing Defendants intent and
 6 basis for Plaintiff’s causes of action.

7 Simply put, Plaintiff must allege that Defendants aimed to or did
 8 discriminate against Ward because of his membership in a protected class.
 9 Plaintiff must introduce this relationship that then ties into FEHA and Plaintiff’s
 10 advocacy or affiliation with the protected class member. Defendants don’t want
 11 this, so they desperately desire to remove the “gay” or “queer” evidence
 12 because it harms them. However such evidence is not subject to Rule 403
 13 because its against Defendants interests.

14 This Court stated in the first paragraph of page 6 of its’ final ruling denying
 15 Defendants Motion for Summary Judgment:

16 "the importance of zealously guarding an employee's right to a full
 17 trial, since discrimination claims are frequently difficult to prove
 18 without a full airing of the evidence and an opportunity to evaluate
 19 the credibility of the witnesses." *McGinest v. GTE ServiceCorp.*, 360
 20 F.3d 1103, 1112 (9th Cir. 2004) [Final Order June 17, 2013]

21 Evidence Rule 403 was not intended to be used to exclude probative
 22 evidence simply because harms Defendants. Indirect evidence or evidence that
 23 infers and supports Plaintiff’s case of discrimination is probative and not
 24 outweighed because Defendants don’t like hearing supporting testimony.

25 Defendants have failed to assert any facts to support their objection under
 26 Rule 403 that the speculated testimony might outweigh probative value.

27 Defendants have once again gotten lost in their own authority that actually
 28 supports the admission, and not exclusion, of inferences and indirect evidence,
 thereby nullifying Defendants Rule 403 argument.

1 **III. DEFENDANTS MISINTERPRET THEIR MISPLACED AUTHORITY.**

2 Defendants' reliance on *Beck v. United Food & Comm. Workers Union*
 3 *Local 99* (9th Cir. 2007) 506 F.3d 874; *Sprint/United Management*
 4 *Company v. Mendelsohn* (2008) 552 U.S. 379 and *Tennison v. Circus Circus*
 5 *Enters., Inc.*, 244 F.3d 684 (9th Cir. 2001) [Defendants Motion in Limine, Pg. 2]
 6 is unpersuasive and seemingly misunderstood by Defendants.

7 In *Beck* the court found that the Plaintiff's limited evidence was
 8 comparative in nature, rather than statistical, and rejected a contention that the
 9 evidence was insufficient to establish discriminatory intent. The limited
 10 evidence was predicated upon two men and a single woman. The Court found
 11 the sole woman was treated differently. Here we are again talking about limited
 12 evidence that the court in *Beck* held to be a sufficient test for relevance and
 13 admission.

14 In *Sprint/United Management*, the Supreme Court of the United States
 15 unanimously ruled "[a]pplying Rule 403 to determine if evidence is prejudicial
 16 also requires a fact-intensive, context-specific inquiry. Because Rules 401 and
 17 403 do not make such evidence per se admissible or per se inadmissible, and
 18 because the inquiry required by those Rules is within the province of the District
 19 Court in the first instance, we vacate the judgment of the Court of Appeals and
 20 remand the case with instructions to have the District Court clarify the basis for
 21 its evidentiary ruling under the applicable Rules." *Sprint* at 388.

22 Finally, in *Tennison* the Ninth Circuit held two "remote" six-year prior
 23 incidents of discrimination were prejudicial [*the exclusion of the more remote*
 24 *incidents of harassment and complaints would help mitigate the prejudice*
 25 *Defendants might encounter as a result of Plaintiffs' prosecution of a joint trial*]
 26 *Tennison* at 690. Here, we are not talking about "remote" incidents six years
 27 prior. This case is about the perceived discrimination of Ward and Plaintiff
 28 during the two-year term of Plaintiff's employment where Plaintiff and others

1 parties also questioned discriminatory motive. The jury is dealing with a
2 relevant period of time during employment and the “totality” of the
3 circumstances in which Plaintiff based his belief in discriminatory intent by
4 Defendants. Inferences and indirect evidence is relevant and heavily probative.

5 Clearly Defendants are simply trying to keep any and all evidence inferring
6 discriminatory intent away from the jury. This is opposite of the rulings in
7 Defendants own rule of law from their authority. Defendants have failed to offer
8 any evidence or compelling argument that warrants use of Rule 403 to preclude
9 the well established standard of admission of inferences and indirect evidence
10 to establish discrimination and retaliation.

11 **IV. CONCLUSION**

12 The standard in discrimination cases is clear; evidence, even indirect
13 evidence that infers a discriminatory motive is relevant to the issues
14 discrimination/retaliation in the workplace.

15 It is not prejudicial simply because Defendants want to simply turn this into
16 a “he said, she said” contest where they can circle the proverbial wagons and
17 soapbox denial of liability.

18 In accordance with established law Defendants *Motion in Limine* should
19 be denied and the jury allowed to weigh all the evidence.

20
21
22
23 Dated June 21, 2013

Respectfully Submitted for the Plaintiff

24
25 By: /s/ Charles Murray
26 Charles L. Murray III
27 Attorney for PLAINTIFF MARK DAVIS
28